

Compatibility of democracy and learner discipline in South African schools

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Versoenbaarheid van Demokrasie en Leerderdisipline in Suid-Afrikaanse Skole

As gevolg van die afskaffing van lyfstraf voel baie onderwysers magteloos om ernstige leerder wangedrag by skole effektiewelik te hanteer. Nogtans bevat die Skolewet kenmerke van verteenwoordigende- en deelnemende demokrasie en is gegrond op die beginsels van aanspreeklikheid, deursigtigheid en billikheid. Demokrasie beteken nie anargie of wetteloosheid nie, maar impliseer die behoud van 'n ordelike en gedissiplineerde skoolomgewing op grond van die oppergesag van die reg. Uit die regspraak is dit duidelik dat die howe deurgaans die behoud van dissipline en respek vir gesag handhaaf, veral in gevalle van kwetsende vrye uitdrukkings en ernstige leerderwangedrag. Fundamentele regte is 'n voorvereiste en grondwetlike element van demokrasie. Elke skool is 'n mikrokosmos van die samelewing en demokratiese praktyke, soos die handhawing van dissipline en die skepping van 'n menseregtekultuur, is in ooreenstemming met die daarstelling van substantiewe demokrasie.

1 Introduction

Since 1994, post-Apartheid South Africa has ventured on the exciting but challenging road of transforming this society to a fully fledged democracy. Section 7(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that the "Bill of Rights is a cornerstone of democracy in South Africa". In other words, the most important building block for establishing democracy in South Africa is the advancement and protection of the fundamental rights as enshrined in the Bill of Rights. Woolman and Fleisch¹ assert that the values of human dignity, equality and freedom enumerated in section 7(1) of the Constitution are species of a generic value: democracy. This important insight underscores the fact that the condition of democracy, and not the value of human dignity, is foundational to the establishment of a mature constitutional democracy in South Africa. Fundamental rights do not stand in opposition to democracy, but are constitutive elements of democracy. In other words, without the rights to equality, dignity, life, personal safety, belief, privacy, expression, assembly, association, voting, political party membership, citizenship, access to information, access to courts, language and culture, safe environment, children's rights, education, and just administrative action, there will be no

¹ Woolman & Fleisch *The Constitution in the classroom – Law and Education in South Africa 1994-2008* (2009) 174.

meaningful democracy in South Africa. These rights are themselves the preconditions for an open and democratic society.²

In present-day South Africa it is not uncommon for educators at schools to be confronted by learners that assertively stand up for their human rights. Such conviction and confidence in the importance and usefulness of human rights in schools and daily life should be welcomed because it points to the establishment and growth of a democratic culture based on respect for human rights. On the other hand, it often occurs that human rights are exaggerated or misconstrued to serve an inappropriate purpose or to obtain a questionable entitlement. Perhaps this is understandable, though not excusable, in view of the fact that South Africa is a fledgling democracy where the content knowledge, fundamental understanding and experience of human rights are still developing. Rossouw and De Waal³ found, in an empirical study, that many students exaggerate their rights, yet they neglect their concomitant obligations, which causes conflict and discipline problems in schools.

Educators feel disempowered in the human rights environment because one of the traditional measures to maintain order and discipline, corporal punishment, has been abolished.⁴ The Constitutional Court held in the matter of *Christian Education South Africa v Minister of Education* that corporal punishment is a form of cruel and degrading punishment that violates a person's human dignity and thus infringes section 12(1)(e) of the Constitution.⁵ Sachs J explained the reason for the prohibition of corporal punishment at schools as follows: "It had a principled and symbolic function, manifestly intended to promote respect for the dignity and physical and emotional integrity of all children".

Over the past fifteen years some of the effects of this general ban on corporal punishment in schools have become apparent. Learner discipline has become a serious problem in South African schools.⁶ As a result, many educators blame the parlous state of poor discipline in many schools on the fact that educators no longer have an effective deterrent as a form of punishment. The majority of educators (58%) favour the reinstatement of corporal punishment in schools and many admit to the continued use of corporal punishment to instill discipline in schools.⁷ Wolhuter and Van Staden⁸ established that 85 percent of teachers are of

2 *Ibid.*

3 Rossouw & De Waal (2003).

4 S 10 SASA prohibits corporal punishment by anyone at a school.

5 *Christian Education South Africa v Minister of Education* [2000] JOL 7320 (CC). S 10 SASA prohibits corporal punishment by anyone at a school.

6 Wolhuter, Oosthuizen & Van Staden "Skoolfase/Leerderouderdom as Faktor in Leerderdissipline in Suid-Afrikaanse Skole" 2010 *T vir Christelike Wetenskap* 169-186.

7 South African Human Rights Commission (SAHRC) *Report on school-based violence* (2008) 1.

8 Wolhuter & Van Staden "Bestaan daar 'n dissipline krisis binne Suid-Afrikaanse skole? Belewens van opvoeders" 2008 *T vir Geesteswetenskappe* 395.

the view that learner discipline problems make them unhappy in their work, and 79 percent have, because of learner discipline problems, at times considered to abandon the teaching profession.

Furthermore, a study by the South African Human Rights Commission in 2008 about school-based violence confirmed many media reports and complaints from educators that violence in many South African schools has reached alarming proportions.⁹ Although serious misconduct only occurs intermittently, school-based violence in South Africa is a multi-dimensional phenomenon and depends on the context in which it arises. Bullying, gender-based violence, discrimination and violence, sexual violence and harassment, physical violence and psychological violence, describe some of the most prevalent forms that were identified by the Human Rights Commission. The strike in 2010 by members of the largest teachers union, the South African Democratic Teachers' Union, was characterised by intimidation, violence, vandalism, and general unlawful conduct by the teachers. School violence can lead to serious consequences that include suicide, limited concentration span, numeracy and literacy learning problems, poor performance in class, high absentee and dropout rates, being unmotivated in class and in general, loss of desire to succeed in life.¹⁰ Schools that experience forms of violence cannot be regarded as democratic institutions where learners learn to live co-operatively for the common good.

As it happens, despite the *Christian Education* decision, many educators ignore the judgment and still illegally apply corporal punishment at schools with the approval of parents.¹¹ Morrell found that corporal punishment is still applied in South African schools despite its illegality and suggests that the general decline in discipline in South African schools is the most important reason for the phenomenon of continued use of corporal punishment.¹² The Human Rights Commission reported that corporal punishment is still applied in more than half of the schools (51.4%), with the Eastern Cape (65.3%), Mpumalanga (64.1%) and Limpopo (55.7%) reporting the highest incidences.¹³ In view hereof the question arises whether the transition to democracy and the establishment of a human rights culture is at all compatible with order and discipline in schools

The aim of this article is to consider the compatibility of democracy (which incorporates human rights) with the maintenance of order and discipline in schools. The main contention of this article is that schools should and can be democratic where order and discipline is upheld with a shared concern for the common good. This article will develop this

9 SAHRC 1.

10 SAHRC 12.

11 Maree "Hitting the Headlines – The Veil on Corporal Punishment in South Africa Lifted" 2004 *Acta Criminologica* 72-85.

12 Morrell "Corporal punishment in South African schools: a neglected explanation for its persistence" *SAJ of Ed* 292-299.

13 SAHRC 11.

contention by discussing the following: (1) the concept of democracy in education; (2) the legislation and case law that determine democracy in schools; and (3) methods to uphold democracy as well as learner discipline in schools.

2 Conceptualising Democracy in the Education Context

The concept “democracy” can be used in the primary restricted sense that refers to political rights (eg voting, regular elections, party political association and state power) or the term can be used in an extended sense that signifies a condition of society that places value on the resolution of problems of communal life through collective participation in societal institutions and deliberation that is characterised by a shared concern for the common good.¹⁴ In this extended sense, the concept “democracy” includes the protection of basic human rights. Yet, schools must under no circumstances be politicised and the purpose of education is certainly not to practise party politics or to promote sectarian political interests at schools. Democracy in schools is not a continuous struggle for party political power, but should be a condition of a society that places value on the resolution of problems of communal life through collective deliberation and a shared concern for the common good.¹⁵

The term “democracy” is commonly invoked by people of quite different political or ideological persuasions and carries with it strong emotional and moral force.¹⁶ Democracy is by its very nature a dynamic concept continually changing and developing according to every particular society’s historical context and social complexities and therefore no definition can include all the variations to satisfy the proponents of each theory of democracy. Briefly, the main theories and models of democracy that have developed since the Enlightenment are representative (or indirect) democracy in terms of the republican theory, liberal democratic theory, elitist theory and social democratic theory. In addition, the models of democracy that have emerged in the modern age since the 1960s are participatory and deliberative democracy.¹⁷ These theories have been discussed copiously elsewhere and in the interest of parsimony it will not be considered in further detail. The theoretical and philosophical models of education systems of different societies are

14 Dewey *Democracy and education: an introduction to the philosophy of education* (1966) 378.

15 *Ibid.*

16 Boomer *Democracy, Bureaucracy and the Classroom. (In: Democracy and Bureaucracy: Tensions in Public Schooling* (1990) 115; Myburgh “Ideological battle over meaning of democracy” 2004 *Focus* available at www.hsf.org.za/focus34/focus34myburgh.html (accessed 2013-03-23).

17 Cunningham *Theories of Democracy: a critical introduction* (2002); Blaug & Schwarzmantel (eds) *Democracy: A reader* (2000).

derived from and linked to the political and historical developments within each society.¹⁸

3 Democratic Schools in South Africa?

To many the phrase “democratic school” is an oxymoron. This might be because traditional school and classroom practise epitomised authoritarian power relations and undemocratic cultures. However, with the rise and ultimate ascendancy of liberal democracy during the Twentieth century came a growing realisation and new awareness that democracy and education are intertwined and that schools should also be democratic institutions.¹⁹ One traditional role of education is to transmit to new generations a continuing image of the community. Education is the culture, which each generation purposely transfers to those who are to be their successors.²⁰ Citizens in a democracy, especially a young developing democracy, do not simply arrive at political maturity and stand ready, willing and able to run its institutions, they have to be trained and educated to acquire the mindset, philosophy, knowledge and skills that are essential for a functional and substantive democracy.²¹ In a democracy, the whole population must acquire a set of political and educational competencies that enable them to value and exercise their fundamental rights and to practice the commitments that go with it.²² Schools are microcosms of society and accordingly the nature and practice of democracy in schools must be congruent with the schooling that citizens receive; otherwise, the educative force of the real environment would counteract the effects of early schooling.²³

Dewey emphasised that schools are not only needed for educational but also for political reasons, because on the school, more than upon any other institution, will depend the quality and nature of the citizenship of the future.²⁴ After all, any political system shapes education and conversely education unquestionably determines the type of political system that a society will have.²⁵ In this regard, undemocratic features in society are reflected in the education system, and undemocratic practices in the education system and schools eventually become imbedded in the culture and ethos of a nation and society.²⁶ By the same

18 Dieltiens *Democracy in education or education for democracy: The limits of participation in South African school governance* (2000) (MEd dissertation University of the Witwatersrand) 44.

19 Carr & Hartnett *Education and the struggle for democracy* (1996) 20-26.

20 Parry & Moran *Democracy and democratization* (1994) 48.

21 Aspin “The Conception of Democracy: A Philosophy for Democratic Education” (1995) (in *Creating and Managing the Democratic School* eds Chapman, Froumin & Aspin)

22 Parry *et al.*

23 *Ibid.*

24 Dewey *op cit.*

25 Dieltiens 5.

26 Smit *A Model for Improving Democratic School Governance in South Africa* (2008) (PhD thesis North-West University Potchefstroom) 438.

logic, it is also true that democratic practices and teaching in schools leave indelible imprints on the youth that will eventually find expression in the life of a nation.

Since the late 1970s most developed liberal democracies have embraced participatory theories of democracy thus extending democratic principles from state institutions into all social spheres and institutions. Participatory democracy means that individuals or institutions should be given the opportunity to take part in the making of decisions that affect them. There are multiplicitous modes of participation including voting, campaigning, group activity, contacting representatives and officials, protesting, attending meetings, petitioning, fund-raising, canvassing and boycotting.²⁷ Participatory democrats emphasise that more participation leads to increased effectiveness²⁸ and that participation educates citizens and stakeholders to transform their interests for the common good.²⁹ Participatory democrats³⁰ have proposed ways to democratise workplaces, the family, media, neighbourhoods, universities, schools, and decision-making on human relations to the natural environment. Therefore, participative and deliberative democracy should ideally be extended to schools, classrooms and various other interactive or social relationships such as management, committee, union and parent meetings.

4 Democratic Features in the SA Schools Act

In keeping with the times the South African Schools Act³¹ (SASA) includes participatory democracy features in terms whereof some state authority is devolved to local school communities known as School Governing Bodies (SGBs).³² The reforms after 1994 unified the previously fragmented education system into one national system. Woolman and Fleisch³³ aver that SGBs operate as a fourth tier of government by virtue of the fundamental administrative, managerial and “political” functions that they undertake. As forums, SGBs have the makings of a great and unique South African democratic tradition.

The Constitutional Court affirmed the democratic design of SASA in the matter of *Head of Department, Mpumalanga Education Department v Ermelo High School* by stating:

27 Parry & Moyser “More Participation, More Democracy?” (1994) (In *Defining and Measuring Democracy* ed Beetham) 46.

28 Barber *Strong Democracy: Participatory Politics for a New Age* (1984) 150.

29 Pateman *Participation and Democratic Theory* (1970) 12.

30 Pateman; Held *Models of Democracy* (1987); Gould *Rethinking democracy: Freedom and Social Co-operation in Politics, Economy and Society* (1988).

31 84 of 1996.

32 Squelch *The establishment of new democratic school governing bodies: co-operation or coercion* (1998) 44-45.

33 Woolman & Fleisch *The Constitution in the classroom – Law and Education in South Africa 1994-2008* (2009) 166.

A governing body is democratically composed and is intended to function in a democratic manner. Its primary function is to look after the interest of the school and its learners. It is meant to be a beacon of grassroots democracy in the local affairs of the school. Ordinarily, the representatives of parents of learners and of the local community are better qualified to determine the medium best suited to impart education and all the formative, utilitarian and cultural goodness that comes with it.³⁴

Elections of members of SGBs take place every three years at schools across South Africa, which makes these elections as significant as the national, provincial and local government elections.³⁵ Every high school must have a representative council of learners.³⁶ Parents, learners, educators and school personnel may participate in the elections.³⁷ These provisions establish a form of representative democracy in schools. Democratic principles such as accountability, transparency and openness are implied by the provisions of SASA that require auditing of financial records,³⁸ annual approval of the school's budget,³⁹ due performance of governing body functions⁴⁰ and regular elections of members of SGBs. The principles of participative and deliberative democracy are apparent from the provisions that require approval of the financial governance by an annual meeting of the parents⁴¹ and participation of interested stakeholders either as members of the SGB or as members of committees⁴² serving under the SGBs. Most well functioning SGBs have committees that attend to matters such as finances, learner discipline, marketing, infrastructure, academic standards, culture, leadership, hostels, sport and parent liaison to name a few. Clearly therefore, SASA contains features of representative, participatory and direct democracy and is based on the underlying democratic principles of administration in terms of democratic values,⁴³ advancement of equity and redress⁴⁴ and public participation.

Sections 2, 6 and 10A of SASA determine that fundamental rights must be advanced and protected in schools. These provisions accord with liberal democratic theory that emphasises the basic human rights of every individual. It is therefore important that every school, every educator, school leader, administrator and every learner should ascribe to democracy as a foundational value by practising respect and tolerance, by purposely advancing equality, and by participating and deliberating in forums such as school governing bodies or learner

34 *Head of Department, Mpumalanga Education Department v Ermelo High School* 2010 2 SA 415 (CC) par 57, 79.

35 S 23 SASA.

36 S 11(1) SASA.

37 Ss 11(2); 23(2), (9), (10) SASA.

38 Ss 42; 43 SASA.

39 Ss 23; 24; 38(2); 39(1) SASA.

40 Ss 20; 36; 37; 38 SASA.

41 S 38 SASA.

42 Ss 23; 24 SASA.

43 S 20(8) SASA.

44 Preamble; ss 20(8); 34(1) SASA.

representative councils. If this does not occur, then it is unlikely that a human rights culture will be established in schools or that the schools and the South African society will become mature democratic institutions.

5 The Rule of Law and School Rules

Section 1(a) of the Constitution determines that South Africa is a constitutional democracy and that it is *inter alia* founded on the values of supremacy of the Constitution and the rule of law. The supremacy of the Constitution means that everybody, including the state, all government institutions, schools, educators, parents and learners are subject to the Constitution. The fundamental assumption underlying the rule of law is that a law must apply equally to all and not be arbitrary in the scope of its application.⁴⁵ Although section 1(a) affirms human rights and freedoms, it must be remembered that every right has a correlative duty and free societies run the risk of becoming anarchies when individual liberties give rise to general lawlessness and disrespect for the rights of others. If a society (or a school) succumbs to violence or lawlessness, be it public or private, then it is an undemocratic society or institution. In addition, section 39(3) of the Constitution provides that:

[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

This means that all the legal rules and principles of the South African common law as well as all the legislation of the pre-constitutional era remain valid and enforceable insofar as it is consistent with the Bill of Rights. Thus, the principles and rules of the South African legal system remain intact and are not swept aside or replaced by the Constitution but must be developed to “promote the spirit, purport and objects of the Bill of Rights”.⁴⁶

It is a gross misconception to regard democratic schools as places where absolute, unmitigated freedom or lawlessness (anarchy) prevails. On the contrary, well-disciplined and orderly schools may well be democratic institutions, but do not of necessity imply rigid or autocratic systems. People living in a democracy are not free to live lawlessly, because a democracy is constituted by the fact that all the people have collectively agreed to abide by the established laws of a country and are subject to the rule of law. In order for a democracy to succeed these laws must be adhered to and should be enforced in terms of the rule of law. A feature of any democratic organisation or institution, such as a school, is that the rule of law applies which implies that the legal rules and principles are adhered to. Democratic schools are therefore per definition orderly organisations where all learners, educators and

45 Cheadle, Davis & Haysom *South African Constitutional Law The Bill of Rights* (2006) 30-38.

46 S 39(2) SA Constitution.

stakeholders must adhere to the law of the land, as well as to legitimate school and classroom rules that have been mutually agreed to by means of a participative process.

The purpose of SASA is to provide a uniform system for the organisation, governance and funding of schools and to establish a disciplined and purposeful school environment, dedicated to the maintenance and improvement of quality learning.⁴⁷ The Constitution enshrines the right to basic education⁴⁸ which implicitly places a constitutional duty on the state and every public school to provide education by ensuring a disciplined and orderly environment that is conducive to effective teaching and learning. One aspect of the right to basic education includes the rights of learners and educators to learn and teach in a safe environment, free from all forms of violence. The system of school governance enables SGBs to take specific regulatory and policy measures to improve the safety and well-being at schools. These measures include, among others:

- (a) To adopt a Code of Conduct (section 8 and section 20(1)(d)).
- (b) To conduct disciplinary hearings to suspend or recommend expulsion of ill-disciplined learners (section 9).
- (c) To determine the times of the school day (section 20(1)(f)).
- (d) To administer and control the school's property, buildings and grounds which are occupied by the school (section 20(1)(g)).
- (e) To recommend the appointment of educators at a school to the Head of Department (section 20(i)).
- (f) To recommend the appointment of non-educator staff at the school to the Head of Department (section 20(j)).

Although these measures do not, at first glance, seem to address school discipline and safety directly, each these measures contribute to the creation of an orderly, secure and respectful school culture and environment. Also, properly designed rules and policies can go a long way towards establishing safe schools.⁴⁹ Well cared for school facilities, clean and hygienic ablution facilities, functional equipment, well-maintained furniture and competent personnel create an atmosphere which is conducive to learning and instils a sense of security. It is well-known that unkempt facilities and poorly maintained property encourage vandalism, graffiti and petty forms of misconduct such as messing with water or littering, simply because it is more difficult to

47 Long title SASA: "To provide for a uniform system for the organisation, governance and funding of schools; to amend and repeal certain laws relating to schools; and to provide for matters connected therewith". S 8(2) SASA provides that a school's code of conduct "must be aimed at establishing a disciplined and purposeful school environment, dedicated to the improvement and maintenance of the quality of the learning process".

48 S 29(1)(a) SA Constitution: "Everyone has the right to a basic education, including adult basic education ...".

49 Oosthuizen *A practical Guide to Learner Discipline* (2008) 4.

identify and punish the culprit(s).⁵⁰ There is also a direct correlation between the perpetration of petty misconduct and the prevalence of serious misconduct. Programmes and measures to clean up and maintain school environments have led to the reduction of both petty and serious forms of ill-discipline.⁵¹

Yet, despite these legislative powers some forms of misconduct such as freedom of expression and serious misconduct by learners (eg alcohol or illegal drug abuse, violence and assault, theft, dishonesty) have been particularly difficult for several schools to deal with in view of the constitutionally protected human rights. The manner in which the courts have adjudicated these cases of learner misconduct will be considered in the following section.

6 Upholding Learner Discipline in Schools – Adjudication by the Courts

6 1 Freedom of Expression and School Discipline

Section 16(1) of the Constitution provides that:

[e]veryone has the right to freedom of expression, which includes freedom of the press and other media, freedom to receive or impart information or ideas, freedom of artistic creativity; and academic freedom and freedom of scientific research.

However, section 16(2) of the Constitution contains internal limitations which demarcate the extent of constitutional free expression and prohibits “propaganda for war; enticement of imminent violence; advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm”.

South African courts have *inter alia* been called on to apply the constitutional standards to determine the limits of freedom of expression in the education or school context concerning physical symbols (*Antonie*,⁵² *Pillay*)⁵³ personal expression (*Williams*),⁵⁴ publication of untrue statements in the media (*Hamata*),⁵⁵ student protests (*Ngubo*)⁵⁶

50 Wilson & Kelling “Broken Windows” (1997) (in *Critical Issues in Policing: Contemporary Readings* eds Dunham & Alpert); see also Wagers *Broken Windows Policing: The LAPD experience* (2008) (PhD thesis State University of New Jersey). ‘Broken windows’ policing has been credited with the historic successes in crime reduction in New York, Los Angeles and schools in America.

51 *Ibid.*

52 *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department* 2000 4 SA 738 (WC).

53 *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC).

54 *Western Cape Residents’ Association obo Williams v Parow High School* 2006 3 SA 542 (C).

55 *Hamata v Chairperson, Peninsula Technikon* 2000 4 SA 621 (C)

56 *Acting Superintendent-General of KwaZulu-Natal v Ngubo* 1996 3 BCLR

and student-generated electronic cyber expression created outside the school setting but having an effect on school discipline (*Le Roux*).⁵⁷

In *Western Cape Residents' Association obo Williams v Parow High School*⁵⁸ the parents of a Grade 12 girl, B, applied for an urgent interdict to compel the school to allow her to attend the matric farewell function. The school had refused *Williams* permission as a result of her continued ill-discipline during the course of the year. *In casu* there was no statutory provision or common law rule that granted the learner a right to attend the matric farewell function. In determining whether a rule should be developed to give effect to the Constitution, the court considered the arguments that the learner's dignity, equality and freedom of expression had been infringed by the school's refusal. However, the Court found that the attendance of a matric farewell function was a social activity and, as such, was a privilege and not an enforceable right. Also, the court considered the interests of the school, the other learners and the applicant and determined on balance that:

Two of the important lessons that a school must teach its learners are discipline and respect for authority. The granting of privilege as a reward for good behaviour is one tool that may be used to teach such lessons. The withholding of such privilege can therefore not be claimed as an infringement of a right to equality or to dignity. Indeed, the granting of the privilege in the absence of its having been earned may well constitute an infringement on the rights to equality and dignity of those who have merited the privilege. The right to freedom of expression, of course, does not equate to a right to be ill-disciplined or rude. The system of rewards for good behaviour permeates all walks of life and to learn the system at an early age can only benefit the learner later on in his or her life. I see nothing of constitutional concern in the use of such a system in schools.⁵⁹

The court supported the role of the school to educate the learner towards proper behaviour and therefore a learner's wish to express herself at a matric farewell dance was justifiable limited by the school's obligation to maintain order and discipline and to educate all learners.

In *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department*⁶⁰ the School Governing Body suspended a learner from school for wearing dreadlocks in contravention of the school's uniform dress code. The student, *Antonie*, was a Rastafarian and wore dreadlocks as part of her religious practice. The school could not show that the right to basic education or any other fundamental right in terms of the Bill of Rights had been infringed, because the learner's dreadlocks had not caused a substantial disruption of school discipline

369 (N).

57 *Le Roux v Dey (Freedom of Expression Institute & Restorative Justice Centre as amici curiae)* JOL 27031 (CC) (2011).

58 *Western Cape Residents' Association obo Williams v Parow High School* 544.

59 *Ibid* 545B-C.

60 *Antonie v Governing Body, the Settlers High School and Head, Western Cape Education Department* 2000 4 SA 738 (WC).

and did not prevent others from receiving education. Van Zyl J held that the infringement of the school's uniform dress code was not a serious misconduct and did not warrant suspension. In a similar matter of *MEC for Education, KwaZulu-Natal v Pillay*, the Durban Girls High School wanted to prohibit the learner from wearing a gold nose-stud to school as it contravened the school's uniform dress code. Although the school was concerned that the conduct of *Pillay* would create a precedent and incite other girls to follow the fashion trends of piercing their noses, the school could not present any evidence to show that *Pillay's* conduct had negatively affected the discipline of others. The Constitutional Court upheld the right of *Pillay* to freedom of expression in keeping with her South Indian family traditions and culture.⁶¹ Yet, Langa CJ (for a unanimous court) reiterated that this case was not about the constitutionality of school uniforms and emphasised that school uniforms served admirable purposes. Therefore, although the court ordered the schools to grant an exemption from the provisions of its dress code as it was not regarded as a factor that would negatively affect the discipline of other learners, the Constitutional Court was by implication still mindful of maintaining school discipline.

The matter of *Le Roux v Dey*⁶² involved the harmful abuse of freedom of expression when *Le Roux* created a computer image at his home in which the faces of the principals and deputy principal of his high school were super-imposed on an image of two naked gay bodybuilders sitting in a sexually suggestive posture. The image was circulated to many other learners and eventually placed on the school's notice board. The Constitutional Court dismissed the learners' defence that it was done in jest as a school boy prank. The Court rejected the contention that the freedom of expression should be allowed and held that the manipulated computer image was insulting, offensive or defamatory. The learners were ordered to apologise and to pay compensation to the plaintiff.

These decisions affirm that the courts have interpreted the constitutional right to freedom of expression in favour of maintaining learner discipline at schools.

6 2 Serious Misconduct and Expulsion of Learners

In instances of serious misconduct, SASA provides in section 9(1)(a) that the governing body of a public school may, after a fair hearing, suspend a learner as a corrective measure for a maximum of one week (five school days). As an alternative, section 9(1)(b) determines that a governing body may suspend a learner with the recommendation of expulsion from the school, pending the decision of the head of the provincial department of education. However, schools have at times struggled to expel ill-disciplined learners because of a reluctance on the

61 *Western Cape Residents' Association obo Williams v Parow High School* 2006 3 SA 542 (C).

62 *Le Roux v Dey*.

part of the provincial education Heads of Department (HoDs) to affirm a recommendation of expulsion. It seems that the education authorities have not come to terms with the democratic requirement that the rule of law should be maintained and that schools should be supported in their effort to “establish a disciplined and purposeful school environment”.⁶³

A case in point is the matter of *Maritzburg College v Dlamini NO*⁶⁴ where three learners at the school were involved in an incident in which they had consumed alcohol and had smashed a window of a hired bus. A bottle of brandy was discovered in one learner's kitbag. A proper and fair disciplinary hearing was held and the three learners were found guilty of serious misconduct involving use of alcohol and vandalism. The governing body suspended the learners and recommended expulsion to the HoD. The HoD of KwaZulu-Natal neglected to decide the matter for 21 months. When court action by the school was imminent the HoD decided that it was unlawful to suspend learners pending his decision. The court held that the school's action was lawful and that suspension pending final decision by the HoD was correct. The High Court ordered the expulsion of the learners from the school and therefore affirmed that discipline should be upheld in schools.

In *Phillips v Manser*⁶⁵ the court confirmed the legality of school governing body's decision to suspend a learner from attending the school for serious misconduct pending a decision by the HoD to expel the learner. The learner was found guilty of several instances of serious misconduct which *inter alia* included assault of another learner, dishonestly forging letters, writing graffiti on school furniture and inhaling chloroform in the science laboratory. The learner, Phillips, applied to court to review the governing body's decision and contended that his right to basic education in terms of section 29(1) of the Constitution would be infringed. The court held that the fundamental right to basic education applies only for the duration of a learner's compulsory school age, ie when a learner becomes 15 years old or finishes grade 9, whichever is the first to occur. It is the duty of the provincial HoD to make other arrangements to accommodate expelled learners. Phillips also contended that the school did not have a code of conduct and that the HoD failed to timeously confirm the expulsion within 14 days of the governing body's recommendation. Kroon J found in favour of the school and held that the procedure was fair and the substantive decision was just and therefore the HoD was obliged to confirm the expulsion. The court held that the HoD has a limited discretion to decline the recommendation to expel an ill-disciplined learner and affirmed that the right to basic education lasts until a learner reaches the age of 15 years or attains grade 9, whichever occurs first. Again, this decision by the court affirms that the constitutional right to basic education is limited if learners commit serious misconduct.

63 Long title SASA.

64 *Maritzburg College v Dlamini NO* [2005] JOL 15075 (N).

65 *Phillips v Manser* [1999] 1 All SA 198 (SE).

In *Pearson High School v Head of the Education Department Eastern Cape Province*⁶⁶ the school launched an urgent application for review and setting aside of the HoD's decision that a learner of the school may not be expelled. The HoD required of the school to assist the learner with guidance and counseling and more "fairness and compassion". During a fair hearing the learner had been found guilty by the disciplinary committee of *inter alia* purchasing, possessing, smoking and secreting dagga.⁶⁷ The court set the HoD's decision aside and ordered the expulsion of the learner.

In the matter of *George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province*⁶⁸ the HoD of the Eastern Cape, ignored a recommendation by the SGB to expel a learner. The school sought the review of the HoD's decision not to expel an ill-disciplined learner. The 13 year old learner had been found guilty by the governing body's disciplinary committee of serious misconduct including frequent assault of boys and girls, sexual molestation of girls, threats and bad language towards teachers. The parents of the learner were reluctant to accept any responsibility for the upbringing of their child. The HoD initially gave no reasons for his decision and after many protracted delays eventually averred that the disciplinary procedure was unfair and that psychological counselling should be provided for the learner. The school contested these reasons as factually inconsistent with the findings and thus unreasonable. The matter became moot when the learner did not renew his registration for the following academic year at the school. No finding was made on the merits, but the court awarded costs at party and party scale (ie not punitive costs) against the Member of the Executive Council.

In *Tshona v Victoria Girls High School*,⁶⁹ the learner had a previous record of misconduct and had previously received a suspended expulsion. Thereafter the learner behaved in an ill-disciplined manner again. A notice to attend the disciplinary hearing was received and signed for by the learner and was sent to her parents. Neither attended the hearing. The disciplinary committee continued in their absence and heard evidence on the misconduct. The learner was found guilty in her absence and was expelled from the hostel. In an urgent application to court the learner's lawyer argued that section 9(1) and (2) of SASA required the HoD's approval of the expulsion decision from hostels. In other words, it was argued that expulsion from a school should be understood to include expulsion from a hostel. The court rejected this argument and held that a learner's right to attend a school and receive basic education is not infringed by expulsion from a hostel. The court

66 *Pearson High School v Head of the Department Eastern Cape Province* [1999] JOL 5517 (Ck)

67 Colloquial term for marijuana.

68 *George Randell Primary School v The Member of the Executive Council, Department of Education, Eastern Cape Province* [2010] JOL 26363 (ECB).

69 *Tshona v Principal, Victoria Girls High School* 2007 5 SA 66 (E).

awarded a punitive cost order (*de bonis propriis*) against the learner in favour of the school.

These cases confirm that the courts have consistently interpreted the Constitution and legislation as supportive of the maintenance of school discipline.

6 3 Administrative Justice and Fair Process – Courts Defer to Schools

The Constitution also promotes rational decision-making by the state and its functionaries as opposed to arbitrary exercise of public power. The constitutional provisions are designed to ensure openness (transparency), fairness, accountability and legitimate decision-making in a democracy. The High Court has jurisdiction to review administrative action and the Constitutional Court is the final court to adjudicate constitutional matters. According to section 33 of the Constitution everyone has the right to administrative justice:

33. Administrative justice.

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights ...

Reasonableness in terms of section 33(1) implies a decision that is “structured” in a rational fashion.⁷⁰ This means that the decision must be supported by the evidence and information before the administrator and the reasons given for it. Reasonableness also implies reasonable effects, also known as proportionality.⁷¹ The principle of ensuring fair procedure (“due process”) and substantively correct decisions is illustrated by several cases involving ill-disciplined learners.

In the matter of *Van Biljon v Crawford*,⁷² a learner was dishonest during an examination and illegally used “crib notes”. During an informal hearing or enquiry that was held in the principal’s office, the learner admitted the misconduct. As punishment the learner was demoted and lost his prefect badge. Thereafter the learner contested the procedural fairness of the informal hearing and denied guilt in the matter. It was argued that the hearing had not complied with the Department’s guidelines for a fair disciplinary hearing. The court upheld the precedent set in *Shidiak v Union Government*,⁷³ which provides that if an official (such as the principal *in casu*) is charged with a duty and exercises his discretionary competency by applying his mind and deciding in good faith, ie *bona fide* not *mala fide*, then the court is not entitled to replace

70 Hoexter, Lyster & Currie (ed) *The New Constitutional and Administrative Law Vol 2* (2002) 181.

71 *Ibid.*

72 *Van Biljon v Crawford* unreported case 475/2007 (EC).

73 *Shidiak v Union Government (Minister of the Interior)* 1912 AD 642.

the official's decision by its own. The court also found that the procedure followed during the informal hearing did not have to comply strictly with the guidelines for section 9 of SASA, because the punishment did not involve suspension or expulsion from a school. Therefore, *Van Biljon* confirms that as long as it is procedurally fair and the decision is substantively just, then an informal hearing may be held in respect of school matters that will not lead to suspension or expulsion. The court will defer to the principals if they exercise their discretionary competencies reasonably and in good faith.

In *Governing Body, Tafelberg School v Head, Western Cape Education Department*⁷⁴ the learner concerned, who was then a 14-year-old boy, admitted to, and was duly found guilty by the school of the theft of a computer hard drive from the school. The governing body recommended expulsion of the learner, but the HoD decided against expulsion. It appeared that the HoD had based his decision to re-admit the learner on several written submissions made by the learner's parents and that the school governing body had not been provided with copies or afforded an opportunity to respond to the parents' representations. It was contended on behalf of the school that the procedure adopted by the HoD was unfair and in breach of the tenets of natural justice and that his decision consequently had to be set aside. The court held that the maintenance of proper discipline amongst a school's learners was of fundamental importance to those in authority at any decent school and, in particular, to its governing body. This was reflected in section 9(1) of SASA, which clothed the governing body of a school with powers calculated to enable it to enforce school discipline. Thring J found that the HoD's decision had had a materially adverse effect on the school governing body's interests in maintaining proper discipline. The court decided not to simply substitute its own decision for that of the person whose function it was to make that decision (in this case the HoD), especially if it was discretionary in nature. Accordingly, the decision of the HoD was set aside and the matter referred back to him so that he could properly reconsider his decision by taking the submissions of the school governing body into account.

The outcome of these cases affirm that the requirements of procedural fairness in maintaining learner discipline in schools accords with the democratic principles of openness and the common law rules of natural justice. However, *Maritzburg College, Pearson* and *George Randell* illustrate the very unsatisfactory results for schools that were obliged to approach the courts for relief because the HoD refused expulsion of ill-disciplined learners for spurious reasons. Similar situations occur all too frequently in practice, while most schools do not have the heart or means to pursue litigation. This discourages educators and school leaders to take effective steps to remedy ill-discipline among learners and is one of the causes of poor discipline in schools.

74 *Governing Body, Tafelberg School v Head, Western Cape Education Department* 2000 1 SA 1209 (C)

7 Limitation of Rights

The general limitation clause and other limitation provisions in the Bill of Rights are further confirmation that democracy is compatible with the maintenance of learner discipline in schools. A democratic society should always be subject to the rule of law otherwise the powerful tend to abuse their power (political/administrative, physical, cultural or financial) to the detriment of the common good. For this reason it is essential that individual rights and liberties may and should be limited where necessary without diminishing its core essence. Compliance with the rule of law and requirements of legality is a pre-requisite to any litigation and is in the long term best interest of the children and people in the South Africa.⁷⁵ Although the Constitution is supreme, section 7(3) affirms that the fundamental human rights are not absolute and are subject to limitations or restrictions in terms of section 36 or elsewhere in the Bill of Rights. In the matter of *De Reuck v Director of Public Prosecution*⁷⁶ Epstein J linked the limitation of rights to the balancing process by stating:

I reiterate that the rights contained in the Bill of Rights are not absolute. Rights have to be exercised with due regard and respect for the rights of others. Organised society can operate only on the basis of rights being exercised harmoniously with the rights of others. Of course, the rights exercised by an individual may come into conflict with the rights exercised by another and, where rights come into conflict, a balancing process is required.

The boundaries of human rights are set by the rights of others and by the legitimate needs of society.⁷⁷ Generally, the legitimate needs of society that justify the imposition of restrictions on human rights are: public order, safety, health, morals and democratic values. The nature and practice of law requires continuous balancing of rights and values. It is the particular domain of the courts to strike a balance between the claims and duties, liberties and vulnerabilities, entitlements and liabilities of parties involved in a legal dispute. However, this does not mean that rights can be limited for any reason or by any societal rule. All rights, albeit fundamental human rights or non-fundamental rights, may be limited in accordance with the law. The courts have the judicial authority to adjudicate whether the limitations or infringements of rights are in accordance with the law. Fundamental rights may be limited in the following ways:

- (a) Limitation in terms of the general limitation provision, section 36 of the Constitution.

⁷⁵ *The Governing Body of Mikro Primary School v Western Cape Minister of Education* case 332/2005 (WC) 50: "It is difficult to imagine how it could ever be in the best interests of children, in the long term, to grow up in a country where the state and its organs and functionaries have been elevated to a position where they can regard themselves as being above the law, because the rule of law has been abrogated as far as they are concerned".

⁷⁶ *De Reuck v Director of Public Prosecution* 2004 1 SA 406 (CC) 89B.

⁷⁷ Currie, De Waal & Erasmus *The Bill of Rights Handbook* (2006) 144.

- (b) Definitional demarcation of a right.
- (c) Specific limitations of a right.
- (d) Suspension of rights during a state of emergency in terms of section 37 of the Constitution.

The general rule is the protection of an individual's right or freedom; the limitation is the exception.⁷⁸ Usually, no matter how important a collective goal is, it cannot be pursued in a manner which violates individual rights. Accordingly, the limitation clause in the Bill of Rights, section 36,⁷⁹ provides a mechanism in terms whereof individual rights must by occasion give way to social concerns of overriding importance.⁸⁰ Woolman avers that the general limitation provision in the Bill of Rights is probably the most important section in the Constitution;⁸¹ not because the fundamental rights are unimportant, but because the general limitation provision applies to and regulates all cases that involve conflicting fundamental rights. Woolman describes this process as a "cost-benefit analyses" in terms whereof the cost and benefits of the affected parties must be weighed against each other to strike an appropriate balance.⁸² In other words, the balancing of rights would require that the equilibrium is re-established by bringing equally important rights to an even keel.

The limitations analysis requires that the least restrictive means of limiting fundamental rights must be favoured and applied. If punishments for infringement of school rules can be made less restrictive and still achieve the same objective, then it should be done. For instance, if a learner has committed misconduct such as disrupting a class by boisterous behaviour, then the learner can be disciplined without having to be suspended from school. The learner's right to basic education will in so doing be brought into balance (equilibrium) with the school's right to maintain discipline. Neither the school nor the learner's rights are limited in their entirety, but the extent of the right of the learner is adjusted.

School principals responsible for the professional management, governing bodies responsible for governance of schools and educators responsible for teaching and classroom management, can apply the

78 *Ibid.*

79 S 36 Constitution – Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including–

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

80 Currie *et al* 145.

81 Woolman "Limitation and suspension" (1996) 60 (in *Constitutional Law of South Africa* eds Chaskalson, Kentridge, Klaaren, Marcus, Spitz & Woolman).

82 *S v Makwanyane* 1995 6 BCLR 665 (CC).

section 36 balancing process by establishing the proportional weight of conflicting rights in a variety of situations. At times it will be required of educators to make snap decisions in a classroom concerning such conflicting rights. It is understandable that such “spur of the moment” decisions will not always be as accurate as a judgment of a court, because the latter has the convenience of the lengthy legal process, copious legal argument and time to reflect and consider the issues. Nevertheless, it is necessary that educators should practice and become *au fait* with the process of balancing conflicting rights in classroom situations. This will enable educators to become more assertive in maintaining discipline. Not only will the consistent demonstration of the balancing process contribute to the learners’ understanding of their fundamental rights and the limitations thereof, but the learners will also be empowered with life skills to manage conflict in accordance with constitutional principles. In the long run, it will be to the distinct advantage of the South African society as a whole if a culture of respect for fundamental rights and the constitutional process of balancing rights is taught in schools as part of the socialisation function of education.

9 Discussion: Establishing Disciplined and Democratic School Cultures

Education is probably the most important instrument for cultivating a human rights culture and establishing a consolidated and substantive democracy. Learners have to be prepared for their future responsibilities as citizens of a democratic society. As learners are not born with an understanding of the principles of democracy, public schools function as the nurseries of democracy.⁸³ Democratic values and principles cannot successfully be affirmed and transmitted to learners if an education system is bureaucratic or displays autocratic values and principles. If a school is run by autocrats, it is not likely to produce democratically minded citizens. It follows that one cannot achieve a good democracy without a good education. Most schools have traditionally functioned and continue to function as semi-autocratic organisations. Yet, democratisation of schools requires an inculcation of knowledge, values and attitudes into substantive democratic practice by means of education.⁸⁴ Therefore, the philosophy of education in a democracy requires that the education system should be one in which schools are themselves organised democratically to promote a mode of associated living embedded in a culture of social relationships and social intelligence which is the prerequisite to individual freedom and growth.⁸⁵

This implies that the nature and practice of democracy in societal institutions, such as schools, must be congruent with the education that

83 Steyn, Du Plessis & De Klerk *Education for democracy* (1999).

84 Chapman, Froumin & Aspin (eds) *Creating and managing the democratic school* (1999) 58.

85 *Ibid.*

citizens receive; otherwise, the educative force of the real environment would counteract the effects of early schooling.⁸⁶

It is a misconception to regard democratic schools as places where unmitigated freedom or anarchy prevails. On the contrary, orderly and well-disciplined schools can function democratically. Any democratic organisation or institution, such as a school, should per definition be orderly organisations where all the learners, educators and stakeholders must adhere to legitimate school and classroom rules that have been mutually agreed to by means of a participative process and to the law of the land.

The aim of education in a democracy is to gain knowledge useful for real life, to build moral character and the growth of the whole person: intellectually, personally, socially and professionally.⁸⁷ Yet, schools must under no circumstances be politicised and the purpose of education is certainly not to practise party politics or to promote sectarian political interests at schools. Democracy is not a continuous struggle for political power, but should be a condition of a society that places value on the resolution of problems of communal life through collective deliberation and a shared concern for the common good.⁸⁸

Therefore, democratic values and attitudes such as respect for human dignity, the achievement of equality, the advancement of freedoms, tolerance, responsiveness and accountability cannot be instilled by merely conferring political rights to citizens or by establishing formal democratic institutions, but also need to be educated and demonstrated by example and application in the education system and schools. The usual characteristics of democratic schools are adequate stakeholder participation; unselfish civic-minded attitudes; power neutrality; adherence to the law; fair procedures and just administration; accountability; openness and transparency; and the advancement of human rights. All these characteristics imply that the conditions and environment in schools should be well ordered and disciplined.

10 Conclusion and Recommendations

The court decisions affirm that the constitutional standards and fundamental rights support the maintenance of learner discipline in schools. Also, SASA contains numerous provisions to enhance learner discipline. Only the prohibition of corporal punishment at schools has hampered the maintenance of learner discipline to some extent. However, not only does the fundamental right to freedom and security of person protect an individual against public violence by the state, but it also protects every person's physical and psychological integrity against private violence. Democratic schools should by definition be safe schools

86 Parry *et al* 48.

87 Dewey *op cit*.

88 *Ibid*.

where learners are able to learn in a disciplined and purposeful environment. In this regard, the nature and extent of poor discipline in many South African schools is a grave cause for concern.

When not threatening school discipline, the South African courts have ruled in favour of upholding students' rights to freedom of expression. However, when the exercise of free expression has been harmful to persons, educational institutions or individuals, or has substantively affected school discipline, the courts have limited learners' rights to free expression in order to protect the safety of persons, and the dignity of individuals or the discipline at schools. The *Phillips* decision has affirmed that the right to basic education is not absolute and that learners who commit serious misconduct may justifiably be expelled in order to maintain an orderly and disciplined school environment.

The examples of the *Tafelberg*, *Pearson*, *Maritzburg College* and *George Randell* cases provide substantiation of the fact that provincial administrators at times display attitudes averse or indifferent to the democratic principles of responsiveness, accountability and transparency. This constrains participation by stakeholders in education whose rights or legitimate expectations are materially and adversely affected.

The present provisions of SASA place an unfair burden on schools that, in practice, have no other effective means of dealing with serious misconduct. A week's suspension is ineffectual, because learners usually regard it as a holiday or welcome rest from school obligations. As a result of administrative injustice and obstructionist attitudes of the education authorities schools struggle to expel learners. This undermines the democratic design of SASA and causes educators to feel disempowered in the human rights environment. In order to address this shortcoming it is recommended that section 9 of SASA should be amended to allow for lengthy suspension of up to 180 school days (ie one school year). This will convey a strong message of support for educators that may otherwise consider leaving the profession as a result of ill-discipline at schools.

In order to further the democratisation of schools in South Africa it is imperative that all available policy, regulatory and administrative measures should be implemented and that effective legal remedies should be developed and extended to ensure the establishment of a purposeful learning environment.